

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

JUAN JOSE DEANDA,  
Petitioner,

v.

AMY MILLER,  
Respondent.

Case No. [13-cv-02135-BLF](#)

**ORDER GRANTING MOTION TO  
DISMISS PETITION FOR WRIT OF  
HABEAS CORPUS WITH LEAVE TO  
AMEND**

[Re: ECF 5]


On September 18, 2014, Respondent filed a Motion to Dismiss the petition for writ of habeas corpus filed by petitioner Juan Jose Deanda pursuant to 28 U.S.C. § 2254. Resp't Mot., ECF 5. Respondent asserts that claim 2 of the petition—alleging ineffective assistance of counsel—was not properly presented to the state court. *Id.* 2-4. Because the petition thus contains both exhausted and unexhausted claims, the petition must be dismissed. *Id.* Petitioner, in his response filed September 29, 2014, does not oppose the Motion to Dismiss, but rather seeks leave to amend his petition in order to excise the unexhausted claim. Pet. Resp., ECF 6. The time for Respondent to file a reply brief has elapsed, and the Court has not received any objection from Respondent regarding Petitioner's request to amend.

A district court may not adjudicate a "mixed habeas petition" that contains both exhausted and unexhausted claims. *Rose v. Lundy*, 455 U.S. 509, 518–19 (1982). However, a petitioner should generally be given the opportunity to amend his petition to delete any unexhausted claims and proceed only on the exhausted ones. *Henderson v. Johnson*, 710 F.3d 872, 873 (9th Cir. 2013). As such, and in light of Respondent's silence on the matter, the Court HEREBY GRANTS Respondent's Motion to Dismiss with leave to amend. Petitioner shall file an amended petition **within twenty-one (21) days** of the date of this order. Upon the filing of the amended petition,

the parties shall follow the briefing procedure and schedule set forth in Rule 5 of the Rules  
Governing Section 2254 Cases and Rule 2254-6 of the Habeas Corpus Local Rules.

**IT IS SO ORDERED.**

Dated: October 16, 2014

  
BETH LABSON FREEMAN  
United States District Judge

United States District Court  
Northern District of California